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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

STATE OF CALIFORNIA, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of
Health and Human Services, *et al.*,

Defendants,

and,

THE LITTLE SISTERS OF THE POOR,
JEANNE JUGAN RESIDENCE, *et al.*,

Defendant-Intervenors

Case No.: 4:17-cv-5783-HSG

JOINT STATUS REPORT

On August 17, 2021 the Court stayed this case and ordered the parties to file status reports every three months. ECF No. 467. The parties report as follows:

- 1 1. This case concerns the validity of two rules which create a moral exemption, and
2 expand a religious exemption, to the rules establishing the contraceptive coverage
3 requirement. *See* Religious Exemptions and Accommodations for Coverage of
4 Certain Preventive Services Under the ACA, 83 Fed. Reg. 57,536 (Nov. 15,
5 2018); Moral Exemptions and Accommodations for Coverage of Certain
6 Preventive Services Under the ACA, 83 Fed. Reg. 57,592 (Nov. 15, 2018).
- 7 2. The Court has before it fully briefed dispositive motions, *see* ECF Nos. 311, 366,
8 368, 370, as well as supplemental briefs addressing the Supreme Court’s decision
9 in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct.
10 2367 (2020), *see* ECF Nos. 433, 435, 437, 438, 440.
- 11 3. On August 3, 2021, the parties filed a joint status report, in which Federal
12 Defendants asked the Court to stay the case to permit the defendant agencies to
13 evaluate the issues presented by this litigation, as well as their regulatory and
14 policy options. ECF No. 462. The Court had once previously held the motions
15 in abeyance. ECF No. 454. Plaintiffs and intervenor March for Life did not object
16 to the request. Intervenor Little Sisters objected.
- 17 4. On August 16, 2021, Federal Defendants announced that “[t]he Departments [of
18 Health and Human Services, Treasury, and Labor] intend to initiate rulemaking
19 within 6 months to amend the 2018 final regulations and obtaining public input
20 will be included as part of the Departments’ rulemaking process.” CMS.Gov,
21 Frequently Asked Questions, Affordable Care Act Implementation FAQs (Set 48)
22 (Aug. 16, 2021) (available at [https://www.cms.gov/CCIIO/Resources/Fact-](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs#Affordable_Care_Act)
23 [Sheets-and-FAQs#Affordable_Care_Act](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs#Affordable_Care_Act)).
- 24 5. On August 17, 2021, the Court held a case management conference. The Court
25 granted Federal Defendants’ request to stay the case and directed “counsel . . . to
26 e-file a joint status report every three months.” ECF No. 467.
- 27 6. The parties filed their last status report at the end of January 2022. Federal
28

1 Defendants reported that they had determined that they would be unable to meet
2 their anticipated target to issue a notice of proposed rulemaking by mid-February
3 2022 for two reasons: (1) the agencies have limited resources and face many
4 competing and extraordinary demands on those resources, particularly in light of
5 the ongoing pandemic and public health emergency; and (2) the agencies continue
6 to evaluate the issues presented by this litigation, as well as their regulatory and
7 policy options. ECF No. 469.

- 8
- 9 7. The Agencies continue to work toward rulemaking. But, as noted in the last status
10 report, their progress is affected by (1) their resource limitations and competing
11 demands on those resources, including the updating of guidance addressing the
12 coverage of items and services related to COVID-19, and (2) their on-going
13 evaluation of their regulatory and policy options. Of course, the agencies
14 recognize the importance of finality, and they will continue to work toward
15 initiating the rulemaking as quickly as is possible consistent with resource
16 limitations and prudent decision making.
- 17 8. Federal Defendants propose that the case remain stayed and that the parties
18 continue to file joint status reports every 90 days to apprise the Court of the status
19 of the rulemaking and of the parties' positions on the need for a continued stay.
- 20 9. Plaintiff States disagree with the Little Sisters's unsubstantiated claim that the
21 Exemption Rules are not causing harm. Indeed, the States remain very concerned
22 about the ongoing harm to women while this case is held in its current posture and
23 the Exemption Rules are operative. *See* States Mot. [Dkt. No. 311] at pp. 1-3
24 (describing the extensive record evidence demonstrating the benefits of
25 contraceptive coverage, the corresponding impact on society, and the States, and
26 the harm that occurs with the loss of full healthcare coverage). Moreover, under
27 the Exemption Rules, employers need not give any notice to the government or
28 their employees that they are utilizing the Rules. *See* 83 Fed. Reg. at 57,558 (these

Rules “do not impose any new notice requirements”) *id.* at 57,574 (entities can “avoid sending any supplemental notices”); *see also* States Opp. [Dkt. No. 385] at 50 n.24; States Supp. Br. [Dkt. No. 433] at 4, 6, 9. Thus, neither the public nor the government will ever know the extent to which employers are utilizing the Exemptions Rules and thereby depriving women of their healthcare benefits. *See* Tr. of Dec. 16, 2020 Hr’g on Cross-Mots. for Summ. J. at 26:20-26:21 (“the rules are designed in a way that ensures that nobody would have notice”); *see also id.* at 28:7-28:9 (the rules do not “identify any mechanism for a woman who wants to bring a challenge to her employer”). At a minimum, the U.S. Department of Health and Human Services itself estimated that 30 million women gained access to contraceptive coverage due to the Women’s Health Amendment and up to 126,400 women stand to lose contraceptive coverage due to the Religious Exemption Rule. 83 Fed. Reg. at 57,551; *see also* Appendix to States Mot. [Dkt. No. 313] Ex. 17 (D9 571363).

Nevertheless, in light of the Federal Defendants’ commitment to evaluating the issues presented in this case, as well as interests in judicial economy, Plaintiff States do not oppose the Federal Defendants’ proposal to keep the litigation in its current posture.

10. March for Life does not oppose continuing to stay the case at this time.

11. The Little Sisters believe the case should proceed to decision. From the start, this case has been driven by the States’ claims of urgency. In 2017, the States represented to this Court that allowing religious exemptions would “inflict irreparable harm upon the States” and would amount to the “trampling of constitutional rights.” ECF No. 28 at 3, 28-29. The States told the Court that the situation was urgent and dire: “Every day the IFRs are in effect is another day that employers can eliminate contraceptive coverage for employees and their dependents.” ECF No. 28 at 29. Among other things, the State asserted that the

1 rules “will likely cause unintended pregnancies to rise, triggering a chain of events
2 with widespread repercussions” and that the consequences would be “immediate
3 and far-reaching.” ECF No. 28 at 29, 30. The States said “such harm is irreparable
4 because it cannot be undone with a successful result at the end of the litigation.”
5 ECF No. 28 at 30. For that reason, the States told this Court that “[t]he only way
6 to avoid this disruption is to ensure that the ACA’s guarantee of no-cost
7 contraceptive coverage is maintained while this litigation proceeds.” ECF No. 28
8 at 30.

9 At the time—and throughout this case—the Little Sisters have explained that
10 the States could not show that the religious exemption was causing any harm,
11 much less urgent and irreparable harm requiring immediate relief. ECF No. 75 at
12 7 (“The States cannot show that even a single employer has dropped or will drop
13 contraceptive coverage because of the IFR.”); ECF No. 75 at 9 (“The States offer
14 no evidence that these exemptions have caused an iota of harm, much less the
15 severe harms they predict.”); ECF No. 75 at 25 (“[T]he States cannot find a single
16 actual person who will be harmed . . .”).

17 In reliance on the States’ persistent claims of urgency, this Court moved
18 quickly to grant emergency relief just before Christmas 2017. ECF No. 105. A
19 year later, when the rules were finalized, this Court again took the States’ every-
20 single-day-is-irreparable-harm claim seriously, issuing another injunction in early
21 2019. That injunction issued on a Sunday, January 13, 2019, before the final rules
22 could take effect the next morning. ECF No. 234.

23 Now that the case is in its fifth year, the States’ claims of urgency and harm
24 are belied by their continued reluctance to litigate. It has been nearly two years
25 since the Supreme Court reinstated the allegedly harmful rules in the summer of
26 2020. Despite the States still supposedly seeking an injunction, they have shown
27 no urgency to actually resolve their claims, apparently hoping instead that the
28

1 federal government will someday change the allegedly harmful rules. But if the
 2 States are just waiting for the political process to change what has now been the
 3 law of the land for a long time, they do not need to be in court. They should just
 4 abandon their case and participate in that political process directly, rather than
 5 through this Court. Alternatively, this Court should decide the long-pending
 6 motions against the States—fully informed by the States’ ongoing acquiescence
 7 in delay, which is a tacit admission that the exemptions are not at all harmful and
 8 don’t need to be enjoined. Such a decision would provide certainty and finality to
 9 the Little Sisters and other religious employers, who have sought conclusive
 10 protection from the Mandate and its crushing fines for nearly a decade now.

11 For these reasons, the Little Sisters respectfully request that the abeyance be
 12 lifted and judgment be entered against the plaintiff States.

13
 14 Dated: May 2, 2022

Respectfully submitted,

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